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Filed : August 12, 2003

REMARKS

Claims 1-22, 28-49 and 55-73 were pending in the application. By this paper, Applicant amended Claims 1, 9, 28, 36, 44-45, 47, 55, 60, 68, and 69, cancelled Claims 14, 30, 43, 65, and 70 without prejudice, and added new Claims 74 and 75. Accordingly, Claims 1-13, 15-22, 28-
5 29, 31-42, 44-49, 55-64, 66-69, and 71-75 are presented for examination herein.

§103 Rejections

1. Per page 2 of the Office Action, Claims 1-22, 28-49, and 55-73 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Eldering, et al. (U.S. Patent Publication No. 2002/0144263; hereinafter referred to as "Eldering") in view of Kinder, et al. (WO Patent Publication No. 2001/91474; hereinafter referred to as "Kinder"). In response hereto, Applicant provides the following remarks.

Claim 1 – Applicant respectfully traverses the Examiner's §103 rejection of Claim 1 as
15 being unpatentable over Eldering in view of Kinder.

Applicant notes that *"To establish prima facie obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art."* In re Royka, 490 F.2d 981 (CCPA 1974). See MPEP 2143.03.

On page 2 of the Office action, the Examiner states that Eldering teaches "*detecting an
20 indicator indicative of an event in the delivery of the programming content*" {emphasis added}.

Subsequently on page 3 of the Office Action, the Examiner states that Kinder teaches "*the receipt of an indication (feedback tags) the tags indicate the current program a user is watching*". Further, the Examiner contends that Kinder teaches "*in response to a detection of
25 the indicator, generating a list of individual ones of the plurality of user terminals currently receiving the programming content; providing, to the at least one group, the at least one programming segment in lieu of at least a portion of the programming content during the event*". {emphasis added}

Applicant respectfully disagrees with the Examiner's assertions, and points out that the Examiner is using two different interpretations of the term "indicator". Specifically: (i) an
30 indicator of an event in the delivery of content, and (ii) feedback tags - the tags indicate the current program a user is watching. Applicant asserts that: (i) the Examiner cannot change the

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definition of the same term he applies within the same Claim; and (ii) the latter interpretation is not consistent with the language of Claim 1, and interpretation used throughout Applicant's specification as filed. Specifically:

5 (i) As noted above, the Examiner uses inconsistent interpretations of Applicant's claim terminology within the same claim, in violation of well established case law. See *inter alia*, *Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342 (Fed. Cir. 2001) ("a claim term should be construed consistently with its appearance in other places in the same claim or in other claims of the same patent"). The Examiner respectfully cannot adopt one interpretation of the same term
10 in one place, and another interpretation in another place, to support his obviousness rejection.

(ii) MPEP 2111 sets forth "[d]uring patent examination, the pending claims must be given the broadest reasonable interpretation consistent with the specification. *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997); *In re Prater*, 415 F.2d 1393, 162
15 USPQ 541 (CCPA 1969)." {Emphasis added} Claim 1 presented herein sets forth "*an indicator indicative of an event in the delivery of the programming content*." On the contrary, Kinder merely describes periodic modifications of the schedule "*based on feedback received from actual viewers*" (page 7, lines 16-17). Therefore, Applicant respectfully asserts that when the correct interpretation of element "indicator" (i.e., that consistent with Applicant's specification and
20 Claim 1), is used, Kinder does not teach "*in response to a detection of the indicator, generating a list of individual ones of the plurality of user terminals currently receiving the programming content; providing, to the at least one group, the at least one programming segment in lieu of at least a portion of the programming content during the event*".

Applicant further submits that Kinder does not teach or suggest generating substantially
25 in real time at least one programming segment based at least on the data, as now recited in Claim 1. Rather, at col. Page 5, lines 6-23, Kinder merely discloses modifying previously scheduled content ("*Based on the modified demographic mapping, different content files may be selected for broadcast as indicated in block 42*"). In other words, Kinder discloses modifying the broadcast schedule of pre-existing scheduled content ahead of broadcast or transmission time,
30 based on the periodic updates of demographic information of users currently receiving scheduled

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content. Kinder respectfully does not teach: (i) generating new content substantially in real time; or (ii) replacing one portion of content with a different portion in real time during the event.

Based on the foregoing, Applicant respectfully submits Eldering and/or Kinder do not teach or suggest all of the limitations of amended Claim 1. Therefore, Claim 1 as amended distinguishes over the art of record, and thus is not rendered unpatentable thereby.

Claim 9 – Applicant respectfully traverses in relevant part the Examiner’s §103 rejection of Claim 9 as being unpatentable over Eldering in view of Kinder.

On page 5 of the Office Action the Examiner contends that Eldering discloses “generating, subsequent to identifying one or more groups of user terminals within the set of user terminals receiving the program stream, one or more data streams containing one or more alternate programming segments for the scheduled programming segment (Para. 0073-0074).” Applicant disagrees.

Applicant submits that Eldering does not teach or suggest generating, subsequent to identifying one or more groups of user terminals within the set of user terminals receiving the program stream, one or more data streams containing one or more alternate programming segments for the scheduled programming segment. Instead, at paragraph [0073-0074], Eldering illustrates an “ad channel generator ... transmits different advertisement groups to different cable nodes”. The model of Eldering does not identify any groups of terminals, and use this information subsequently for the generation of data streams. To further clarify this distinction, Claim 9 has been amended herein to recite generating, subsequent to and based at least in part on identifying one or more groups of user terminals within the set of user terminals currently receiving the program stream, one or more data streams containing one or more alternate programming segments.

The Examiner contends that Kinder discloses “in response to a detection of the message, identifying a set of user terminals currently receiving the program stream; and generating a content to substitute the scheduled content”. Applicant respectfully asserts that when the correct interpretation of the element “detection” (i.e., consistent with Applicant’s specification and the language of Claim 9) is used, Kinder does not teach either (i) “identifying a set of user terminals currently receiving the program stream” or (ii) generating ... one or more data streams containing one or more alternate programming segments for substituting the scheduled

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programming segment”, in response to detection of the message. **Neither of the foregoing acts are respectfully performed “in response to detection of a message” in the program stream.**

However, in order to yet further distinguish the invention of Claim 9 over the prior art, Applicant has, by this paper, amended Claim 9 to recite limitations relating to (i) directing at least one user terminal in a selected one of the one or more groups to tune from a first transmission channel to a second transmission channel at the start of the scheduled programming segment; (ii) transmitting at least one of the data streams over the second transmission channel; and (iii) directing the at least one user terminal in the selected one of the groups to re-tune to the first transmission channel at the end of the scheduled programming segment.. Support for this amendment can be found in, *inter alia*, the body of the original Claim 14. Hence, no new matter has been added.

On page 6 of the Office action, the Examiner contends that Eldering teaches the aforementioned new limitations. Applicant disagrees, and notes that at paragraph [0061] Eldering merely describes allowing the STB to "*tune to the proper VPI/VCI (corresponding to the group of the STB) in order to receive ads appropriate for it*". Applicant respectfully asserts that Eldering is silent on (i) directing at least one user terminal in the selected group to tune from a first transmission channel to a second transmission channel at the start of the scheduled programming segment; and (ii) and directing the at least one user terminal in the selected group to re-tune to the first transmission channel at the end of the scheduled programming segment, as now recited in Claim 9.

Therefore, respectfully, none of the prior art cited by the Examiner, including Eldering, and/or Kinder, teaches or suggests all of the limitations of amended Claim 9. Hence, the claim is not rendered obvious thereby.

Claim 28 – By this paper Applicant has amended Claim 28 to recite limitations relating to the system being configured to identify available transmission channels in the network, the at least one programming segment being transmitted over at least one of the available transmission channels. Support for this amendment is found in, *inter alia*, the body of the original Claim 30 and the specification as filed. No new matter has been added.

On page 9 of the Office action, the Examiner contends that Eldering teaches “*the system wherein available transmission channel in the network are identified, the at least one*

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programming segment being transmitted over at least one of the available transmission channels (figure 7, label 701)". Applicant disagrees, and notes that Eldering element 701 refers to the ad channel generator, which is configured to receive ads and correlation information (paragraphs [0071]-[0072])). At paragraph [0073] Eldering sets forth:

5

"The ad channel generator 701, based on the AD- ID-GROUP table information and GROUP-NODE- ID table information transmits different advertisement groups to different cable nodes"

10 Applicant therefore contends that Eldering is silent with respect to dynamically assigning physical transmission channels, and respectfully asks the Examiner to point out specifically relevant passages within Eldering's specification that support his contentions of "*available transmission channels in the network are identified*".

15 Furthermore, Applicant asserts that Kinder does not teach "*a processing unit in response to a detection of an indicator, for generating a list of an audience currently receiving the programming content; providing programming segment in lieu of at least a portion of the programming content during the event*", wherein the indicator indicates an event in the delivery of the programming content as recited in the original Claim 28. Rather, such an interpretation by the Examiner is inconsistent with Applicant's specification and in violation of MPEP 2111,
20 discussed *supra*.

Applicant further submits that Kinder does not teach or suggest a processing unit, responsive to a detection of the indicator, for generating a list of an audience currently receiving the programming content, data being obtained which is descriptive of at least one group of members of the audience, as recited in Claim 28.

25 Applicant therefore respectfully submits that each and every limitation of amended Claim 28 is not taught or suggested by Eldering and/or Kinder. Thus, the claim as amended is not rendered obvious thereby.

Claim 36 – Applicant respectfully traverses the Examiner's §103(a) rejection of Claim
30 36 as being unpatentable over Eldering in view of Kinder.

On page 9 of the Office action the Examiner states that Eldering teaches a module for dynamically assigning transmission channels. Applicant disagrees.

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Applicant respectfully asks the Examiner to point out specifically relevant passages within Eldering's specification that support his contentions of (i) dynamically assigning transmission channels, and (ii) a mechanism for providing to the at least one data stream over a dynamically assigned transmission channel.

5 Applicant notes that element 701 of Fig. 7 refers to the ad channel generator, which is configured to receive ads and correlation information (paragraphs [0071]-[0072]), and contends that Eldering is silent with respect to dynamically assigning physical transmission channels.

Further, on page 10 the Examiner argues that Eldering discloses at paragraph [0089] "*a server for generating one or more data streams containing one or more alternate programming*
10 *segment for substituting the scheduled programming segment*". Applicant disagrees and notes that paragraph [0073] of Eldering sets forth:

15 "[0073] The ad channel generator 701, based on the AD- ID-GROUP table information and GROUP-NODE- ID table information transmits different advertisement groups to different cable nodes via a wire line or wireless link. For exemplary purposes, group D ads are shown to be transmitting to node 6 (711), group A ads are shown to be transmitting to node 10 & 713), group B ads are shown to be transmitting to node 12 (715), group C ads are shown to be transmitting to node 17 (717), and group E ads are shown to be transmitting to
20 node 21 (719)."

Eldering merely describes an ad server that can generate multiple programming streams, tailored to different groups of users, that are directed to different nodes, and not "alternate programming segments for substituting scheduled programming segment within the program
25 stream," as recited in Claim 36. Stated differently, there is no "substitution" of a scheduled programming segment within the program stream, but rather transmission of different advertisement groups to different nodes; no substitution of one advertisement for another within the same program stream is respectfully apparent to Applicant.

However, in order to more clearly distinguish the invention of Claim 36 over the prior
30 art, Applicant has herewith amended Claim 36 to include limitations relating to (i) the recited at least one characteristic comprises a function of at least the number of available transmission channels in the network, and (ii) the alternate programming segment not being present in the programming schedule prior to the detection. Support for this amendment is found in, *inter alia*, original Claim 43 and page 6, lines 20-32 of the specification. Hence, no new matter has been

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added. Applicant asserts that neither Eldering nor Kinder teach either of the abovementioned limitations.

On page 12 of the Office Action, the Examiner contends that Eldering teaches “*the method wherein the one or more groups are identified as a function of at least the number of available transmission channels in the network (figure 6, labels 605 & 607)*”. Applicant disagrees, and contends that Figure 6 of Eldering merely describes the mapping of advertisement groups to the corresponding VPI/VCI channels, and is silent with respect to available transmission channels in the network. There is respectfully a difference between (i) mapping known advertisement groups (contrast, groups of user terminals) to extant VPI/VCI circuits, and (ii) identifying groups of user terminals based at least on the availability of transmission channels (which may or may not be available).

Note also that Applicant’s user terminal groups of Claim 36 do not necessarily correspond to any particular node, whereas the advertisement groups of Eldering necessarily do have such a correspondence. Applicant submits that to modify Eldering so that its advertisement groups were not dedicated to particular nodes (as in Claim 36) would: (i) change the basic operating principle of Eldering, in violation of MPEP 2143.01 (“If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious.” *In re Ratti*, 270 F.2d 810 (CCPA 1959)); and (ii) render the Eldering system unsatisfactory for its intended purpose in violation of MPEP 2143.01 (“If proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification.” *In re Gordon*, 733 F.2d 900 (Fed. Cir. 1984)).

Furthermore, while Kinder at page 7, lines 16-19 describes “*broadcast content may be modified dynamically based on the currently active viewer demographics*”, it in no way teaches providing “alternate programming segment that is *not* present in the programming schedule prior to detection” as now recited in amended Claim 36. That is, the invention of Claim 36 allows insertion of new, previously unscheduled programming segments (e.g., advertisements) in response to the detection event. This allows for the fine tuning of he tailored content and enables decision-making to be performed in real time, and not *a priori*, as shown in Fig 3 of Kinder. Kinder only shows rescheduling or re-ordering of existing, previously scheduled segments.

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Based on the foregoing, Applicant therefore respectfully submits that each and every limitation of amended Claim 36 is not taught or suggested by Eldering and/or Kinder. Thus, the claim as amended is not rendered obvious thereby.

5 **Claims 55 and 60** – Applicant respectfully traverses the Examiner’s §103 rejection of Claims 55 and 60 as being unpatentable over Eldering in view of Kinder.

On page 13 of the Office Action, the Examiner states that Eldering teaches “*allocating one or more available transmission channels for conveying at least one advertisement data stream, the number of available transmission channels allocated being a function of the number*
10 *of the groups and the number of program channels being requested by the set of the plurality of users during the scheduled presentation of the programming content*”. Applicant disagrees, and asserts that paragraph [0072] of Eldering sets forth:

15 “[0072] In FIG. 7, ad channel generator 701 is shown to receive information about the correlation of advertisement groups to corresponding nodes. This correlation may be represented as a GROUP-NODE_ID table 709 wherein each cable node is identified by a NODE_ID and the GROUPNODE_ID illustrates how each node corresponds to a group.”

20 Eldering therefore merely describes an ad channel generator containing a table (Fig 6) that maps a specific ad group to an appropriate VPI/VCI node. Applicant respectfully asserts that Eldering does not describe allocating one or more available transmission channels in response to an event (e.g., detection of an indicator in the program stream), as recited in Claim 55.

25 Moreover, Applicant asserts that Kinder does not teach “*if the detector is detected; providing an alternate content in lieu of providing the advertising segment within the programming content*”, wherein the “detector is indicative of a scheduled programming segment within programming content” as recited in the Original Claim 55. See discussion of “indicator” presented *supra* with respect to Claim 1.

30 Similarly, Kinder does not teach “*processing unit responsive to a detection of the indicator, for generating a list of an audience receiving the programming content during the scheduled presentation of the programming content, one or more groups of the audience being identified*”, as recited in Claim 60.

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Applicant further submits that Kinder does not teach or suggest providing at least one programming segment in lieu of at least a portion of the programming content as recited in Claims 55 and 60. Rather, at col. Page 5, lines 6-23, Kinder merely discloses modifying previously scheduled content “*based on the modified demographic mapping, different content files may be selected for broadcast as indicated in block 42*”. In other words, Kinder discloses modifying the broadcast schedule based on the demographics of the users currently receiving the scheduled content, and does not teach replacing one portion of content with a different portion during the event. Stated simply, the pre-existing content “blocks” of Kinder are shuffled, rather than a new content block being swapped in for an existing block, and the existing block removed.

However, in order to more clearly distinguish the inventions of Claims 55 and 60 over the prior art, Applicant has herewith amended Claims 55 and 60 each to recite that the one or more advertisements are not present within the programming schedule prior to the recited detection. Support for this amendment is found at, *inter alia*, page 6, lines 20-32 of Applicant’s specification as filed. Hence, no new matter has been added. Based on the relevant arguments made above with respect to Claim 36 *supra*, Applicant asserts that the above-mentioned limitation is not taught by the art of record.

Since Eldering and/or Kinder (whether taken alone or in combination), do not teach or suggest all of the limitations of amended Claims 55 and 60, Applicant submits that Claims 55 and 60 as amended are not rendered obvious thereby.

Claim 65 – Without remarking on the merit of the Examiner’s rejection, Applicant has by this paper cancelled Claim 65 without prejudice, thereby rendering this rejection moot.

Claim 68 – Applicant has herein amended Claim 68 to recite the following limitations: a processing unit adapted to, responsive to the detection (of the recited segment), (i) ascertain an identity of individual ones of the plurality of users receiving said scheduled programming content; (ii) categorize the individual ones of the plurality of users receiving the scheduled programming content into one or more groups; and (iii) selectively replace the segment within the scheduled programming content comprising first advertisements with the one or more second advertisements.

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Moreover, Claim 68 now recites a server adapted to, responsive to the aforementioned detection, dynamically select one or more of the plurality of available transmission channels to convey one or more second advertisements, the second advertisements targeted at one of the one or more groups of said plurality of users. Support for this amendment can be found at, *inter alia*,
5 original Claims 36, 55, 60, 68; and page 12, lines 26-28, and page 18, lines 24-26 of Applicant's specification as filed. Therefore, no new matter has been added by way of this amendment.

Applicant asserts that Kinder does not in any way teach or suggest a processing unit adapted to, responsive to detection of the recited segment, (i) ascertain an identity of individual ones of the plurality of users receiving the scheduled programming content; and (ii) selectively
10 replace the segment within the scheduled programming content, as recited in Claim 68. Applicant asserts that none of the art of record teaches the abovementioned limitations (including especially determination of identity and/or selective replacement of content, based on detection of a segment).

Applicant further submits that Kinder does not teach or suggest selective replacement of
15 the segment within the scheduled programming content comprising first advertisements with the one or more second advertisements, as recited in amended Claim 68. Rather, at col. Page 5, lines 6-23, Kinder merely discloses modifying previously scheduled content ("*Based on the modified demographic mapping, different content files may be selected for broadcast as indicated in block 42*"). In other words, Kinder discloses modifying the broadcast schedule based on the
20 demographics of the users currently receiving the scheduled content, and does not teach replacing one portion of content with a different portion during the event.

Applicant also contends that Eldering does not teach or suggest server adapted to dynamically select one or more of said plurality of available transmission channels to convey one or more second advertisements, said second advertisements targeted at one of said one or more
25 groups of said plurality of users. Respectfully, Eldering merely describes ad channel generator containing a table (Fig. 6) that maps advertisement groups to VPI/VCI nodes. Applicant asserts that Eldering does not describe dynamically allocating one or more available transmission channels in response to an event, as now recited in Claim 68 ("responsive to said detection").

Since Eldering and/or Kinder (whether taken alone or in combination), do not teach or
30 suggest all of the limitations of amended Claim 68 Applicant submits that claim as amended is not rendered unpatentable thereby.

Claim 69 – Applicant has herein amended Claim 68 to recite the following limitations:

(i) in response to a detection of the indicator, (i(a)) identifying available transmission channels in the network; (i(b)) generating a list of individual ones of the plurality of user terminals currently receiving the programming content; (i(c)) obtaining data descriptive of at least one group of members of the list; (i(d)) providing at least one advertisement based at least on the data; (i(e)) providing, to the at least one group, the at least one advertisement in lieu of at least a portion of the advertising event in the programming content; (i(f)) transmitting the at least one programming segment over at least one of the available transmission channels; (i(g)) directing at least one user terminal in the selected group to tune from a first transmission channel to a second transmission channel at the start of the scheduled programming segment; (i(h)) transmitting the at least one data stream over the second transmission channel; and (i(i)) directing the at least one user terminal in the selected group to re-tune to the first transmission channel at the end of the scheduled programming segment. Support for this amendment can be found at, *inter alia*, original Claims 14, 36, 55, 60, and page 12, lines 26-28, page 18, lines 24-26 of Applicant's specification as filed. Therefore, no new matter has been added by way of this amendment.

Applicant asserts that Kinder does not teach or suggest the abovementioned limitations (i(a)) through (i(i)), i.e., in response to a detection of the indicator (the indicator comprising "detecting a cueing indicator indicative of at least one timing reference associated with an advertising event in the delivery of the programming content") as recited in amended Claim 69.

Applicant further submits that Eldering does not teach or suggest, in response to a detection of the indicator, generating a list of individual ones of the plurality of user terminals currently receiving the programming content, as recited in Claim 69.

Applicant further asserts that Kinder does not teach or suggest providing at least one advertisement in lieu of at least a portion of the advertising event in the programming content, as recited in amended Claim 69. Rather, at col. Page 5, lines 6-23, Kinder merely discloses modifying previously scheduled content "Based on the modified demographic mapping, different content files may be selected for broadcast as indicated in block 42". In other words, Kinder discloses modifying the known and predetermined broadcast schedule based on the demographics of the users currently receiving the scheduled content, and does not teach replacing one portion of content with a different portion during the event.

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Since the prior art, including Eldering and/or Kinder (whether taken alone or in combination), do not teach or suggest all of the limitations of Applicant's amended Claim 69 Applicant submits that claim as amended is not rendered unpatentable thereby.

Applicant respectfully submits that the Examiner's rejections of dependent Claims 2-8, 10-22, 29-35, 37-49, 56-59, 61-64, 66-67, and 70-73 are rendered moot, given the arguments and/or amendments discussed above with respect to independent Claims 1, 9, 28, 36, 55, 60, 65, 68, and 69, respectively.

New Claims

10 Applicant has thereby added a new Claims 74 and 75 that are related generally to the subject matter of existing Claim9. No new matter has been added.

New Claim 74 recites, *inter alia*: (i) detecting, in the transmitted program stream, information relating to a scheduled programming segment; ... (ii) directing, at the start of the scheduled programming segment, at least one user terminal in the subset to tune from a first transmission channel over which the program stream is being transmitted, to a second transmission channel; (iii) transmitting the data stream over the second transmission channel; and (iv) directing the at least one user terminal in the subset to re-tune to the first transmission channel at the end of the scheduled programming segment.

20 Applicant respectfully submits that these limitations are not taught or suggested by Eldering, Kinder, or the other art of record, in combination with the other limitations of Claim 74.

New Claim 75 recites, *inter alia*: (i) detecting in a program stream information relating to a programming segment, said programming segment being part of a pre-existing programming schedule; ... (ii) generating, based at least in part on information associated with the subset, a data stream containing at least one alternate programming segment for substitution of the scheduled programming segment, the at least one alternate stream not being part of the pre-existing programming schedule; (iii) directing, at the start of the programming segment, at least one user terminal in the subset to tune from a first transmission channel over which the program stream is being transmitted, to a second transmission channel; (iv) transmitting the data stream

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over at least the second transmission channel; and (iv) directing the at least one user terminal in the subset to re-tune to the first transmission channel at the end of the programming segment.

Applicant respectfully submits that these limitations are not taught or suggested by Eldering, Kinder, or the other art of record, in combination with the other limitations of Claim
5 75.

Other Remarks

Applicant hereby specifically reserves all rights of appeal (including those under the Pre-Appeal Brief Pilot Program), as well as the right to prosecute claims of different scope in another
10 continuation or divisional application.

Applicant notes that any claim cancellations or additions made herein are made solely for the purposes of more clearly and particularly describing and claiming the invention, and not for purposes of overcoming art or for patentability. The Examiner should infer no (i) adoption of a position with respect to patentability, (ii) change in the Applicant's position with respect to any
15 claim or subject matter of the invention, or (iii) acquiescence in any way to any position taken by the Examiner, based on such cancellations or additions.


Furthermore, any remarks made with respect to a given claim or claims are limited solely to such claim or claims.

If the Examiner has any questions or comments which may be resolved over the
20 telephone, he is requested to call the undersigned at (858) 675-1670.

Respectfully submitted,

GAZDZINSKI & ASSOCIATES, PC

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